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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

F. DREW CAMINETTI, PETITIONER,
v.
THE UNITED STATES. } No. 139.

MAURY I. DIGGS, PETITIONER,
v.
THE UNITED STATES. } No. 163.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

L. T. HAYS, PETITIONER,
v.
THE UNITED STATES. } No. 464.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases are before this Court on writs of certiorari.

Caminetti was convicted under the first count of an indictment, charging him with wilfully and knowingly transporting or causing to be trans-

ported, and aiding and assisting in obtaining transportation for, and in transporting, in interstate commerce over the line of the Southern Pacific Railway Company, a common carrier, one Lola Norris,

> for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant. (R., pp. 1 and 6.)

Diggs was convicted under the first four counts of an indictment, the first of which differed from the one under which Caminetti was convicted, only in the name of the girl transported (Marsha Warrington), and the party whose concubine it was intended she should become (Diggs). The second count is similar to the second Caminetti count. The third charged Diggs with obtaining, or causing to be obtained, a railroad ticket whereby Marsha Warrington should be transported in interstate commerce over the line of the Southern Pacific Railway Company, a common carrier, for the purpose of becoming his concubine. The fourth makes a similar charge as to procuring a ticket for Lola Norris that she should become the concubine of Caminetti. (R., pp. 1 and 15.)

Hays was convicted under two counts of an indictment which charged him with inducing, enticing, and coercing a girl under the age of eighteen years to go from one State to another for an immoral purpose, and furnishing her a ticket whereby

she was transported over the line of a common carrier engaged in interstate passenger traffic, thus causing her to be so transported, the said transportation being for the further purpose that the girl should be enticed and coerced to engage in immoral practices. (R. p. 5 and 6.)

QUESTIONS PRESENTED.

Each of the cases presents the following dominant question:

> Whether the White-slave traffic Act of June 25, 1910, 36 Stat. 825, prohibits a person from transporting or causing to be transported a woman or girl over the line of a common carrier engaged in interstate commerce, for the purpose of holding sexual intercourse with said woman or girl.

Numerous other questions of secondary importance raised in the several cases will be later dealt with.

THE STATUTES.

The pertinent provisions are sections 2 and 4 of the White-slave traffic Act of June 25, 1910 (36 Stat. 825), which read as follows:

> SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or

with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the Distict of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with

the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

ARGUMENT.

I.

THE WHITE SLAVE TRAFFIC ACT MAKES IT AN OFFENSE TO TRANSPORT OR CAUSE TO BE TRANSPORTED OVER THE LINE OF A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE, A WOMAN OR GIRL FOR THE PURPOSE OF HAVING ILLICIT SEXUAL INTERCOURSE WITH HER.

The several petitioners contend (1) that the White-slave traffic Act does not make it an offense for a man to take a girl across state lines for the mere purpose of illicit sexual intercourse; and (2) that it could not do so because such a transaction lacks every element of commerce, and so falls without the regulatory power of Congress, which, they say, can only deal with cases of commercialized or coerced vice. Assuming, without conceding, that

under some circumstances a man could take a girl from one state to another for illicit sexual intercourse, without accomplishing interstate commerce, no such question is here presented, because the particular facts in these cases indisputably amount to interstate commerce, and thereby wholly eliminate the supposed constitutional question as to whether these girls were transported or caused to be transported in interstate commerce.

Each indictment charges that the petitioner transported or caused to be transported the girls involved, over the line of a named common carrier engaged in interstate commerce. No supporting decisions are required to the point that a *common carrier* cannot transport a *passenger* from one state to another, except in interstate commerce; or that a passenger, so traveling, is moving in interstate commerce, regardless of his purpose in making the trip. This compels the conclusion that the person furnishing the ticket or otherwise bearing the cost of transportation, whether accompanying the passenger or not, causes such passenger to be transported in interstate commerce, and this result is likewise not dependent upon the purpose of the person furnishing the ticket or otherwise causing the transportation. These propositions are amply supported by the *Minnesota Rate Cases,* 230 U. S. 352, 400, *et seq.,* and cases there cited; *People* v. *Compagnie Gen. Translantique,* 107 U. S. 59; *County of Mobile* v. *Kimball,* 102 U. S. 691, 702;

Covington Bridge Co. v. *Kentucky,* 154 U. S. 204, 218; *Chicago, Rock Island Ry.* v. *Wright,* 239 U. S. 548, 550; *Reid* v. *Colorado,* 187 U. S. 137, 146, 150; *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617, 619.

The proposition that, though interstate commerce may be regulated when its purpose is *prostitution,* it may not be regulated when its purpose is merely *illicit sexual intercourse* is untenable, for obviously the two purposes differ not in principle but merely in degree. The *Hoke* and companion cases, 227 U. S. 308, *et seq.,* when properly analyzed, uphold the White-slave traffic Act upon broad principles thus enunciated:

> Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided or transportation induced in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between States and that such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exer-

cise of it and " that the motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat. 512, c. 172. *United States* v. *Popper,* 98 Fed. Rep. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case,* 188 U. S. 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in *Reid* v. *Colorado,* 187 U. S. 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions (320–321).

* * * * *

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independ-

ently or concurrently, to promote the general welfare, material and moral (322).

* * * * *

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no further in the present case.

The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation " among the several States "; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress.
a legal exercise of the power of Congress (323).

Illicit sexual intercourse in its essence is either adultery or fornication, according to the marital

status of the parties, and *ejusdem generis* with prostitution, as shown by *United States* v. *Bitty*, 208 U. S. 393, 402, wherein it was said:

> * * * It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words "any other immoral purpose," must be one of the same general class or kind as the particular purpose of "prostitution" specified in the same clause of the statute. 2 Lewis' Sunderland Stat. Const., § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that in using the words "or for any other immoral purpose," Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining ques-

tions involving the morality or immorality of sexual intercourse between particular persons.

It follows:

1. That petitioners transported or caused to be transported these girls in interstate commerce.

2. That the immoral purpose for which they transported them is within reach of the commerce power of Congress.

Therefore, the real question requiring determination, is not a constitutional one, but solely one of statutory construction, viz., whether the White-Slave Traffic Act prohibits the transportation of girls in interstate commerce for the mere purpose of illicit sexual intercourse.

The purposes denounced by the statute are, " prostitution or debauchery, or for any other immoral purpose " (sec. 2); and " to induce or coerce her * * * to engage in prostitution or debauchery or any other immoral practice " (sec. 4).

Petitioners insist that the statute be restricted to cases of commercialized vice, but make no suggestion of any possible field in which the words " immoral purpose " or " immoral practice " could then operate. The burden rests upon them to establish that the act should be construed " more narrowly than the plain import of its language." *United States* v. *Barnow,* 239 U. S. 74. They urge that the legislative history of the act, coupled with the provision in section 8 thereof " that this act

shall be known and referred to as the ' White-slave traffic act,' " justify their contention. In none of the cases coming before it under this act, has this court resorted to the legislative history or title as an aid to its interpretation—doubtless, for the obvious reason so well stated in *Mackenzie* v. *Hare,* 239 U. S. 299, 308, as follows:

> * * * It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.
>
> Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.

The following illustration used by this court in *United States* v. *Holte,* 236 U. S. 140, 145, lends cogency to the Government's view of the proper construction of the act:

> So we think it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a pro-

> fessional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910 and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime.

And in *Wilson* v. *United States,* 232 U. S. 563, 571, it was said:

> * * * It is argued that the end and object of the act is to prevent immorality and trafficking in girls, and not the mere act of transportation. But we think that by the plain language of the statute, the offense is complete when " any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia " as a result of any of the criminal acts previously described. * * *

Moreover, the exact contentions of petitioners have been rejected in other Federal courts.

In *Johnson* v. *United States,* 215 Fed. 679, 682, 683, wherein the defendant was charged, among

other things, with transporting a girl for the " immoral purpose of having sexual intercourse with her," the court (7 C. C. A.) said:

> * * * Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to his fellow members, and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the adoption of the universal primary canon of interpretation that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible, and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.
>
> A further urge is that the words " prostitution or debauchery or other immoral purpose " do not cover sexual intercourse that is merely unlawful. " Other immoral purpose " are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is " commercialized vice "; that a defendant cannot be guilty unless it be shown that he is financially concerned in " the traffic in women." Prostitution, the first species, involves the financial element. But there is no condition in the statute that the furnisher

of transportation shall be guiltless unless he shares in or somehow profits by the hire of the woman's body. And in Hoke's Case, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, a conviction for transporting a woman " for the purpose of prostitution " was upheld without proof that the woman was a " white slave," an article of barter in " the traffic in women," or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its association with the first species to sexual debauchery, a leading of a chaste girl into unchastity. No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition; and Athanasaw's Case, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher, or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that " commercialized vice " or " the traffic in women for gain " is not the common ground, that the nexus indicative of the genus is sexual immorality, and that fornication and adultery are species of that genus. This conclusion is fortified by United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, where in construing the prohibition of the immigration act against the importation of alien women " for

> the purpose of prostitution or any other immoral purpose," the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations. See, also, United States v. Flaspoller (D. C.) 205 Fed. 1006, in reference to the White Slave Traffic Act.

In harmony are: *United States* v. *Flaspoller,* 205 Fed. 1006, 1007; *Suslak* v. *United States,* 213 Fed. 913; *United States* v. *Warner,* 188 Fed. 682; *United States* v. *Vaughn,* 209 Fed. 719.

Plaintiffs in error cite no case holding a contrary view.

The logical result of their contention would restrict the application of the statute to cases of prostitution and debauchery, for no other classes of commercialized vice are known. Thus the words "immoral purpose," and "immoral practice" would be rendered impotent, and their insertion in the statute made futile. As stated in *United States* v. *Mescall,* 215 U. S. 26, 31, 32:

> * * * "Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

A more cogent reason for the Government's view is that it effectuates, while the view of petitioners frustrates the claimed purpose of the law. Congress is not to be charged with having trifled with the subject of the suppression of commercialized vice. It dealt with it effectively, and the White-slave traffic act, which stands as the expression of the legislative purpose, must be construed upon that basis, if it may be consistently with the language employed. Unless, therefore, petitioners can establish that the ranks of commercialized vice are recruited *directly* from previously virtuous women and girls, it must be assumed that the words "immoral purpose" and "immoral practice" were intended to reach those immoral purposes and practices which, while not *ex proprio vigore* commercialized vice, were the usual stepping-stones thereto. *Athanasaw* v. *United States,* 227 U. S. 326, 330, 331. A girl indulging even infrequently in illicit sexual intercourse, is a prostitute in the making; and commercialized vice cannot be effectively excluded from channels of interstate commerce, unless its facilities be denied for transporting her for purposes such as here proven and having so strong and natural a tendency to make her an ultimate subject of commercialized vice. To paraphrase language used by this court in *Athanasaw* v. *United States,* 227 U. S. 326, 333, illicit sexual intercourse is an "efficient school" of "the special immorality which defendants contend the statute was designed to cover."

Giving the language of the act its ordinary meaning, it would cover the acts charged against plaintiffs in error. *United States* v. *Bitty,* 208 U. S. 393.

In the last-named case the court interpreted the very language now under consideration, as applied to alien women, and under accepted rules Congress must be held to have adopted that interpretation when it later adopted that language in the White-slave traffic Act.

II.

THE COURT'S INSTRUCTIONS TO THE JURY COVERING THE TESTIMONY OF PLAINTIFF IN ERROR DIGGS, CORRECTLY STATED THE LAW.

Petitioner Diggs attacks the following instruction of the court on the ground that it violates the Fifth Amendment of the Constitution which forbids his being " compelled in any criminal case to be a witness against himself " (R. pp. 71, 232):

> The evidence is all before you, and it is for you to say where the truth rests. The defendant has taken the stand in his own behalf, and, so far as his testimony tends to cover the transaction involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she

protested that she should not be left behind, but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them. Now this conflict, so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant, to the extent that you find it material to determine in order to reach your verdict. The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution. After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to

> do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.

He contends that a defendant testifying in his own behalf may invoke the Fifth Amendment to prevent the jury from drawing natural adverse inferences from his testimony in the light of the evidence introduced against him by the Government.

If the law does not distinguish between a defendant testifying in his own behalf, and any other witness, it inevitably follows that, while the Fifth Amendment accompanied Diggs into the court room, it deserted him when he took the stand in his own behalf, so that when testifying for himself he could claim no greater privilege than when testifying on behalf of Caminetti.

It should be borne in mind that the privilege against compulsory self-incrimination is not one

protected against State impairment by the Federal Constitution. It is not an ingredient of "due process of law," nor is it one of "the privileges or immunities of citizens of the United States." As it can be invoked only in a Federal tribunal, the Fifth Amendment should not be interpreted so as to accord the privilege to an accused after he has voluntarily become a witness in his own behalf. Neither the language nor the historic setting of the amendment require such a reading, and the effective administration of the criminal law would be seriously hindered thereby. Such a contention would sacrifice "justice and common sense" at "the shrine of mercy." *Wilson* v. *United States,* 162 U. S. 613, 622. In *Twining* v. *New Jersey,* 211 U. S. 78, this court asserts that the privilege is not a fundamental one; but it disposes of the case upon the assumption that in respect of each of the two defendants, neither of whom took the stand, "the jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him." It should be noted, too, that "in the State of New Jersey (where the case arose) no person can be compelled to be a witness against himself." *State* v. *Zdanowicz,* 69 N. J. L. 619, 622. In the *Twining* case this court said:

> * * * We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory

self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Carta or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process (105–106).

* * * * *

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it can not be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law (113).

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not in-

tend, however, to lend any countenance to the truth of the assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Reg.* v. *Rhodes* (1899), 1 Q. B. 77; Ex parte Kops (1894) A. C. 650 (114).

A. Decisions of the Federal courts.

We now pass to an analysis of the decisions of this and other Federal courts interpreting the scope of the privilege against compulsory self-incrimination.

In *Reagan* v. *United States,* 157 U. S. 301, 305, disposing of an objection to an instruction to the jury to consider among other things the interest of the defendant in the outcome of the case, this court said:

> On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. * * * His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the

amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much of credence he is entitled to.

To the same effect is *Johnson* v. *United States,* 157 U. S. 320.

In *Brown* v. *Walker,* 161 U. S. 591, 597, speaking of the exceptions to the rule against compulsory self-incrimination, this court said:

> 1. Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for the parties, and discloses his criminality, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev. sec. 451; *Dixon* v. *Vale,* 1 C. & P. 278; *East* v. *Chapman,* 2 C. & P. 570; S. C. M. & M. 46; *State* v. *K————,* 4 N. H. 562; *Low* v. *Mitchell,* 18 Maine, 372; *Coburn* v. *Odell,* 10 Fost. (N. H.) 540; *Norfolk* v. *Gaylord,* 28 Connecticut, 309; *Austin* v. *Poiner,* 1 Sim. 348; *Commonwealth* v. *Pratt,* 126 Mass. 462; *Chamberlain* v. *Willson,* 12 Vermont, 491; *Lockett* v. *State,* 63 Alabama, 5; *People* v. *Freshour,* 55 California, 375.
>
> So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State* v. *Wentworth,* 65 Maine, 234; *State* v. *Witham,* 72 Maine, 531; *State* v. *Ober,* 52 N. H. 492; *Commonwealth* v. *Bonner,* 97 Mass. 587;

Commonwealth v. *Morgan,* 107 Mass. 199; *Commonwealth* v. *Mullen,* 97 Mass. 545; *Connors* v. *People,* 50 N. Y. 240; *People* v. *Casey,* 72 N. Y. 393.

In *Wilson* v. *United States,* 162 U. S. 613, 620, 621, upholding the instructions there given to the jury relative to the burden assumed by a defendant witness, this court said:

> Again, the existence of blood stains at or near a place where violence has been inflicted is always relevant and admissible in evidence. Wharton Crim. Ev. § 778; *Commonwealth* v. *Sturtivant,* 117 Mass. 122. The trial judge left it to the jury, if they found that there were blood stains and that the defendant had not satisfactorily explained them, to draw the inference, in the exercise of their judgment, that there was an act of deadly violence perpetrated against a person while upon or connected with the bed clothing. In other words, that the jury might regard blood stains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed.
>
> Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by

him upon the theory of his innocence, but also to regard false statements in explanation or defence made or procured to be made as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. 1 Greenl. § 37; 3 Id. § 34; *Commonwealth* v. *Webster,* 5 Cush. 295.

The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Hicks* v. *United States,* 150 U. S. 442, 452; *Allison* v. *United States,* 160 U. S. 203. The trial judge did not charge the jury to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give to his evidence, under all the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive.

We cannot reverse this judgment for error in either of the instructions complained of.

In *Fitzpatrick* v. *United States,* 178 U. S. 304, 315, objection was made against the cross-examination of the defendant. Holding the cross-examination proper, this court said:

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution

has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the Government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defence, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, *State* v. *Ober,* 52 N. H. 459; and it is also held in a large number of cases that

> when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. * * *

In *Sawyer* v. *United States,* 202 U. S. 150, 165, disposing of a similar objection this court said:

> It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Fitzpatrick* v. *United States,* 178 U. S. 304.

In *Powers* v. *United States,* 223 U. S. 303, 314, it was said:

> As to the contention that the cross-examination before the commissioner shown in the bill of exceptions was improperly extorted from the witness under threat of commitment, an examination of the bill of exceptions, we think, requires an answer overruling this exception. There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant, who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. "Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens" and may be fully cross-examined as to the testimony volun-

tarily given. *Reagan* v. *United States,* 157 U. S. 301, 305. The rule is thus stated in *Brown* v. *Walker,* 161 U. S. 591, 597: * * *.

More directly in point is *Graves* v. *United States,* 150 U. S. 118, wherein the question arose whether it was error for the district attorney to comment to the jury upon the failure of the accused to produce his wife as a witness. While this court held error had been committed, it did so because the wife, even if present, could not have been compelled either by the Government or the defendant to take the stand. This court said, however:

> Had the wife been a competent witness, the comments upon her absence would have been less objectionable. It was said by Chief Justice Shaw in the case of Commonwealth v. Webster, 5 Cush. 295, 316: "But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge." The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do

> it creates the presumption that the testimony, if produced, would be unfavorable. 1 *Starkie on Evidence,* 54; *People* v. *Hovey,* 92 N. Y. 554, 559; *Mercer* v. *State,* 17 Tex. App. 452, 467; *Gordon* v. *People,* 33 N. Y. 501, 508 (120–121).

The principle established by this court in the foregoing cases, is that a defendant testifying in his own behalf stands upon the same plane before the law, as any other witness, and the Fifth Amendment confers upon him, while so testifying, no superior rights.

In *Jacobs* v. *United States,* 161 Fed. 694, the Circuit Court of Appeals for the First Circuit, dealing with a question involving the cross-examination of the accused, said:

> * * * The waiver of the constitutional provision concerns merely the personal conduct and condition of the witness. He offers himself as a witness, and therefore puts himself in the position of any other witness so far that he may be examined with reference to anything pertinent to the case and admissible in evidence therein. * * *

In *Franklin* v. *United States,* 193 Fed. 334, 342, the Circuit Court of Appeals for the Third Circuit said:

> The next assignment was to the court's permitting the defendant Charles Franklin, on cross-examination, to be asked if his license as a court detective of Erie county had not been taken from him. We find no

error in this regard. The scope of cross-examination of a defendant who goes upon the stand may take, in the discretion of a trial judge, considerable latitude. We cannot say that latitude was here exceeded. The question of Franklin's animosity toward the Strongs, who had insisted on his being retired from the work, was involved in the case, and cross-examination which tended to show that his license had been revoked after a judicial investigation brought about by an article published in a newspaper owned by Mr. Strong was pertinent, in connection with other proven expressions of his feelings toward them, as showing animosity against them.

B. Decisions of the State courts.

The rulings of the State courts on the question here in issue are thus concretely stated in 2 Ruling Case Law, p. 432:

> The constitutional privilege of the accused in a criminal trial, not to have his failure to testify commented on by the prosecuting attorney, is waived where he takes the witness stand voluntarily for the purpose of giving testimony in his own behalf. By electing to testify, he places himself in the attitude of any ordinary witness, irrespective of any interest in the cause. As a party, his refusal to answer a particular question, on the ground that such answer would tend to criminate him, could afford him no exemption from the inferences which would naturally

> attach to any other witness, not a party, in such circumstances. His object in taking the witness stand is to show himself innocent of the offense by testifying. Putting himself in such a position, and declining to testify except as to such matters as would tend to exculpate him, refusing to answer the direct, competent and material inquiry raised by the case, is a matter of significance which it is the right, if not the duty, of a prosecuting attorney and of the court to bring prominently to the attention of the jury. * * *

See also note to *Wilson* v. *United States,* 40 U. S. Sup. Ct. Rep. L. ed. 1092; and note to *People* v. *Tice,* 15 L. R. A. 670 et seq.

In Wigmore on Evidence, vol. 4, p. 3149, the applicable rule is thus stated:

> His failure in his testimony to deny or explain the evidence against him which he might naturally have explained is therefore open to inference; and this must be so, however narrowly the extent of the waiver be interpreted. Furthermore where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but the answer is not insisted upon, the inference is of course available.

In Wharton's Criminal Evidence (10th edition), vol. 1, pp. 907 and 915, the author states:

> § 432. *Accused; extent of waiver of privilege against self-crimination.*—If the accused offers himself as a witness to disprove a criminal charge, can he excuse himself

> from answering on the ground that, by so doing, he would criminate himself? The sound rule, and adhered to in most states, is that, so far as concerns questions touching the merits of the offense on trial, the accused, by offering himself as a witness to disprove the charge, waives his privilege as to all relevant facts connected with the offense, except those facts that merely affect his credibility.
>
> * * * * *
>
> This protection from comment does not apply in those cases in which the accused, submitting himself as a witness, declines to answer particular questions on the ground of self-crimination, or fails to explain inculpatory facts, and in such case counsel may comment fully not only on his testimony, but on his appearance and manner when testifying, as well as his failure to produce certain testimony and particular witnesses; and where the wife of accused is by statute made a competent witness, comment may be made on his failure to call her, * * *.

See also the exhaustive treatment of the subject in the opinion of the Circuit Court of Appeals in the Diggs case. (R. pp. 266 and 305; 220 Fed. 548 to 551.)

To support their contention as to the scope of the Fifth Amendment, plaintiffs in error rely upon *Balliet* v. *United States,* 129 Fed. 689, 695. Without attempting an analysis of the opinion in that case, if it be capable of any such construction it is out of harmony not only with the cases herein-

before reviewed, but also such cases as *Kirby* v. *Tallmadge,* 160 U. S. 379, 383; *In re Kellogg,* 113 Fed. 120, 130.

The related objection of Diggs to alleged improper cross-examination of himself, is so satisfactorily dealt with by the circuit court of appeals as to make useless further discussion of the point in this brief. See R. pp. 271, 272, 303, 304. (220 Fed. 553, 554.)

III.

FAILURE OF THE COURT TO INSTRUCT JURY THAT THE TESTIMONY OF ACCOMPLICES MUST NOT ONLY BE CORROBORATED, BUT ALSO RECEIVED WITH "GREAT CARE AND CAUTION," DOES NOT CONSTITUTE REVERSIBLE ERROR.

Petitioner Diggs asserts that the trial court erred in refusing to instruct the jury, that the testimony of accomplices must not only be corroborated, but must be received with "great care and caution." (R. p. 54, Assignments 110 to 113, inclusive.)

1. Had the girls been accomplices, no legal duty rested upon the court to give the requested or any similar instructions. While some decisions hold it to be the better "practice" to give appropriate instructions to the jury in such cases, it is believed none go to the extent of requiring such instructions as matter of law, and treating the failure to give them as reversible error.

Under *Holmgren* v. *United States,* 217 U. S. 509, 523, and the frank concession of Diggs in the Circuit Court of Appeals that in the Federal courts a

person may be convicted upon the uncorroborated testimony of an accomplice, his assignments of error 112 and 113 are clearly bad, as the instructions asked could not have been given as framed. Assignments of error 110 and 111 contain only abstract propositions, and are furthermore open to the objection of being too general and indefinite. *Agnew* v. *United States,* 165 U. S. 36, 52; *United States* v. *Jones,* 8 Pet. 399, 414, 415; *Winn* v. *Patterson,* 9 Pet. 663, 678; *United States* v. *Bank of the Metropolis,* 15 Pet. 377, 406; *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U. S. 226, 257; *Springer* v. *United States,* 102 U. S. 586, 594. The case is thus reduced to one in which no proper instruction was requested, and is directly controlled by *Holmgren* v. *United States,* 217 U. S. 509, 523, in which this court declined to reverse, although the trial court did not give a proper instruction of its own motion as it is here contended it was the duty of the court to do. This court merely said:

> It is undoubtedly *the better practice* for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.

Other cases supporting the view that the trial court is not under legal duty to give special instructions regarding the testimony of accomplices, are: *United States* v. *Ybanez,* 53 Fed. 536, 540; *Richardson* v. *United States,* 181 Fed. 1, 9; *Hanley* v. *United States,* 123 Fed. 849; *Wong Din* v. *United*

States, 135 Fed. 702; *Hee* v. *United States,* 223 Fed. 732, 735; *Commonwealth* v. *Clune,* 162 Mass. 206, 214; *Commonwealth* v. *Holmes,* 127 Mass. 424; *Commonwealth* v. *Wilson,* 152 Mass. 12; *Solander* v. *People,* 2 Colo. 48; *Cheatham* v. *State,* 67 Miss. 335, 344. Bishop, New Criminal Procedure, vol. 2, par. 1169; Phillips, Evidence, vol. 1, p. 91.

2. Conceding *arguendo* that the duty did rest upon the trial court to give appropriate instructions to the jury regarding the testimony of accomplices, it is the contention of the Government that, under the evidence in the Diggs case, the following instruction given to the jury, amply meets the requirement (R. pp. 228, 229):

> In determining the credibility of a witness you will bear in mind that every witness is presumed to speak the truth; but this presumption may be overcome by the manner in which he testifies or the character of his testimony. The jury should take into consideration his character and conduct as disclosed, *his relation to the controversy* and to the parties, if any, his expressed or *apparent bias or partiality, the reasonableness or unreasonableness* of the statements he makes, and all other elements which tend to throw light upon his credibility. * * * *And from all these considerations you determine the weight which you will give to the testimony of any witness.*

3. Finally, the record discloses corroboration of the testimony of the girls involved in the Diggs case, so that the failure, if any, to give proper accomplice

instructions to the jury did not prejudice, and therefore could not constitute reversible error. *Agnew* v. *United States,* 165 U. S. 36; *Connors* v. *United States,* 158 U. S. 408, 411; *Kanawha & M. R. Co.* v. *Kerse,* 239 U. S. 576.

As showing corroboration, there was evidence tending to show that Diggs sought to induce Miss Warrington to falsely tell the officers that she and Miss Norris occupied one room and that the two men occupied the other, though one of the men and a girl occupied each room. R. pp. 124, 129, 144, 168. Futhermore, Miss Warrington and Miss Norris testified as to the details of the arrangements made by Diggs, and by the "four-some", after they boarded the train at Sacramento en route to Reno. R. pp. 142, 165. Many of these details were corroborated by the Pullman conductor and by the porter. R. pp. 113 and 115. The time of the departure of the train, as alleged by Miss Norris was corroborated by the conductor. R. pp. 113, 165. Miss Norris also testified that at the Riverside hotel in Reno, Diggs assumed the name of Enright, and Caminetti assumed the name of Ross. This was corroborated by the clerk of the hotel. R. pp. 116, 117.

IV.

THE TRIAL COURT DID NOT TREAT THE CASE AS INVOLVING A CHARGE OF INTERSTATE TRANSPORTATION FOR THE PURPOSE OF DEBAUCHERY.

Petitioner Diggs alleges that while the indictment charges him with transporting the girls to become concubines, the trial court, in its charge,

dealt with the case as one of transportation for the purpose of debauchery. The contention is devoid of merit, and only vaguely sustainable by relying upon detached portions of the charge. It is elementary that the charge must be read as a whole. *Spring Co.* v. *Edgar,* 99 U. S. 645, 659; *Ewing* v. *Burnet,* 11 Pet. 41, 54.

When so read, it appears that the offense was fairly and accurately stated to the jury. R. pp. 221, et seq.

Conceding his contention, no prejudice could be shown under the evidence, so that the error, if any, would be harmless. See also the opinion of the Circuit Court of Appeals upon this point. R. p. 276; 220 Fed. 558–559.

V.

THE INTRODUCTION OF A CERTAIN SHEET IN EVIDENCE WAS NOT OPEN TO OBJECTION.

Petitioner Diggs excepts to the use as evidence of a certain blood-stained sheet. This was taken from the bed occupied by Caminetti and Lola Norris by the latter and hidden in a closet; and the purpose of its introduction was to establish acts of sexual intercourse. (R. pp. 124, 136, 137.)

Diggs contends that the sheet was introduced for the purpose of creating a belief that Lola Norris had been seduced; that her subsequent testimony showed otherwise, and rendered the evidence irrelevant.

Government counsel frankly stated (R. p. 219) that he did not contend that the stains were due to

anything but menstrual flow; but the sheet was still a proper item of circumstantial evidence in establishing the nature of the room-occupancy. Wide latitude is permitted in the introduction of such evidence. *Thiede* v. *Utah,* 159 U. S. 510, 518.

Clearly the objection that the sheet came from the bed room of Caminetti and Lola Norris rather than that of Diggs and Marsha Warrington (Diggs' brief p. 143), begs the question. Confessedly Diggs bought all of the tickets (as he claimed and now claims with the sole purpose of escaping to Nevada to avoid arrest and scandal; or if for any other purpose, such purpose was framed after the tickets were bought). (Diggs' brief p. 88). The Government contended that one distinct purpose was to enable them to continue illicit relations without arrest or other interruption. The blood stains on the sheet, gown and cloth justified the inference that sexual excitement near the menstrual period may have produced the menstrual flow that night; and the relations between the occupants of the North room may be fairly inferred to have represented the relations between the occupants of the other room of the bungalow.

Moreover relations in which barriers of modesty in woman are broken down are not established in a single night, and in addition to being part of the *res gestae* as affecting what transpired in the bungalow, it tended to evidence that the occupancy by the four of the two berths in the Pullman had not been platonic as Lola Norris had said (R. p. 168).

It also reinforced in this regard, the undisputed evidence dealing with the preferred selection by Diggs of the drawing room rather than separate sections in the open car during the very period of the transportation.

The record will be searched in vain for any showing of improper use of this item of evidence, or that it was unduly emphasized, and the objection must therefore fail for lack of merit.

VI.

THE RECORD SHOWS NO SUCH MISCONDUCT OF COUNSEL AS WOULD CONSTITUTE REVERSIBLE ERROR.

Petitioner Diggs alleges misconduct of Government counsel in their opening and closing arguments to the jury.

The merit of the contention is destroyed by the following excerpt from the court's charge covering the point:

> * * * I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have gone in before you.
>
> * * * * * * *
>
> Perhaps I should again admonish you that to no extent must you permit yourselves to be influenced in your verdict by the fact that this case has attracted so much attention

> and given rise to so much controversy in the public press, the halls of Congress, and among the people, prior to this trial, by reason of certain incidents arising in its earlier history. Those facts are wholly extraneous to your inquiry or mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice flowing therefrom to find reflection in your verdict (234).
>
> * * * * * * *
>
> You will please give me your attention. I am about to state to you the principles of law that apply in this case, and when I have done so it will be your duty to observe them to the *exclusion of any suggestions that may have emanated from counsel or come to you from any other source* (221).

Not only so, but the court carefully admonished counsel from time to time to confine their remarks to the evidence. (R. pp. 49, 219, 220.)

As so well stated in *Dunlop* v. *United States*, 165 U. S. 486, 498:

> If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

It is plain that no possible prejudice resulted.

VII.

DENIAL OF RIGHT TO ASK CERTAIN QUESTIONS OF TALESMEN, NOT OPEN TO OBJECTION.

Petitioner Diggs takes exception to the action of the trial judge in restricting his examination of talesmen. The objection is unworthy of serious consideration in the light of the record, and the wide discretion which necessarily must be exercised by the judge. R. pp. 86 *et seq.* See *Connors* v. *United States,* 158 U. S. 408, 413; *Richards* v. *United States,* 175 Fed. 911.

There is no contention that the jury, as finally sworn, was not a fair and impartial one, and after verdict this is all that can reasonably be required. As stated in *Brown* v. *New Jersey,* 175 U. S. 172, 175:

> The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury.

It is clear that no prejudice resulted.

VIII.

NO ERROR WAS COMMITTED IN REFUSING MOTION TO TRANSFER CASE FROM SAN FRANCISCO TO SACRAMENTO FOR TRIAL.

Petitioner Diggs alleges error in the refusal of his motion to transfer the case for trial from San Francisco to Sacramento. The record (pp. 80 *et seq.*) discloses that the discretion exercised by the court is free from criticism. See *Kennon* v. *Gil-*

mer, 131 U. S. 22, 24. Counsel in their motion conceded that the matter was one of discretion.

Moreover, under section 72 of the Judicial Code, the Northern District of California contains but one division, and under section 53 of the same code the right of a defendant to move for a transfer is restricted to districts containing more than one division, and the granting of such motions even then is not made mandatory.

IX.

OTHER ERRORS ASSIGNED.

The remaining assignments of error upon which Diggs relies relate to instructions given and refused, and can be dealt with in few words.

1. Requested instructions embodied in assignment of error 109 (R. pp. 54, 235, 239; Diggs' brief p. 213), relative to the motive, influence, and immunity of the witness, Marsha Warrington, is bad for two reason: (1) It singles out one witness; and (2) is bedded upon no evidence, inferential or otherwise. *Coffin* v. *United States,* 162 U. S. 664, 675, 677; *Perovich* v. *United States,* 205 U. S. 86, 92.

Furthermore, the matter was adequately covered by the charge as given. (R. p. 228.)

2. Requested instructions set forth in assignments of error 101, 105, 106, 107, which relate to circumstantial evidence, etc. (R. pp. 51, 66, 235–249; Diggs' brief p. 215), were likewise amply covered in the charge as given. (R. pp. 225, 227.)

3. Requested instructions embodied in assignments of error 116 to 134, 150 to 152, and 154 (R. pp. 56-62, 67-69, 235, 245; Diggs' Brief p. 223), which relate to the intent of the accused, are also amply covered by the charge as given. (R. pp. 225, 226, 233.) See on refusal of instructions *Coffin* v. *United States,* 162 U. S. 664, 672.

4. The complaint that the trial court failed to properly instruct the jury on " reasonable doubt " must fall when the charge of the court is examined. (R. p. 227, 234.)

5. The complaint levelled against that portion of the charge (R. p. 232) wherein the court instructed the jury, in substance, that the evidence, if believed by them, was sufficient to sustain conviction under all of the counts of the indictment, is wholly without merit, for the instruction but represents the view which the court could well have expressed in overruling a motion for a directed verdict. Obviously the question whether the evidence, if believed by the jury, makes out a case under the applicable statute, is a pure question of law for the court to decide. *Sparf* v. *United States,* 156 U. S. 51. The instruction is also good under the rule which permits a court to express its opinion to the jury on the evidence. *Allis* v. *United States,* 155 U. S. 117, 123.

Breese v. *United States,* 108 Fed. 804, cited by Diggs to the contrary, is wholly inapposite, as an examination of the particular instruction there complained of will disclose.

X.

INDICTMENT IN HAYS CASE NOT OPEN TO ATTACK.

Petitioner Hays seeks, for the first time in this court, to attack the form of the indictment under which he was convicted. He alleges that the indictment which charges him with having transported etc. the girl with the intent to induce her to give herself up to "prostitution and debauchery and other immoral practices," should have specified the particular acts constituting the immoral practices.

The objection comes too late. It was not urged either in the trial court or in the Circuit Court of Appeals. *Allis* v. *United States,* 155 U. S. 117, 120. Furthermore, no bill of particulars was asked for, and the record abounds with evidence that the accused fully understood the charge alleged against him, and was thereby enabled to properly prepare his defense. That is all that could be demanded, especially at this stage. *Bartell* v. *United States,* 227 U. S. 427, 433; *Ledbetter* v. *United States,* 170 U. S. 606, 612; *Durland* v. *United States,* 161 U. S. 306, 315. As so well said in *Grant Brothers* v. *United States,* 232 U. S. 647, 661:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena,* 224 U. S. 89, 96; *Campbell* v. *United States,* id. 99, 106.

XI.

REQUESTED ACCOMPLICE INSTRUCTIONS PROPERLY REFUSED.

Petitioner Hays further complains of the refusal of the court to give his requested instructions covering the alleged accomplice testimony of the girl whom he transported.

The objection seems to have been adequately disposed of by the Circuit Court of Appeals as follows (R. p. 129; 231 Fed. 106, 110):

> The ruling was clearly right. The request as framed by counsel was improper upon two grounds. First, the girl was not an accomplice. *United States* v. *Holte,* 236 U. S. 140, 145; *Diggs* v. *United States,* 220 Fed. 545, 553. Second, even if she were an accomplice, the request as framed states the requirements much too strongly. The admonition given by the court adequately safe-guarded defendant's rights. There is no precise formula which must be observed in the Federal courts. They are not bound by state statutes on the subject. The admonition to be given is a matter of caution and not a hard and fast rule of law. *Hanley* v. *United States,* 123 Fed. 849. The language used may properly be varied to some extent according to the degree of criminality of the accomplice and the circumstances under which he testifies. Wigmore on Evidence, Sec. 2057.

See also the discussion of the same point under heading III of this brief.

CONCLUSION.

An impartial examination of all the records establishes that petitioners had fair trials free from reversible error, and it is therefore respectfully submitted that the judgments should be affirmed.

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